Supreme Court, U.S.
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No. 10-955

In the

Supreme Court of the United States

AARON WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 24, 2010

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QUESTIONS PRESENTED

(1) After abandoning on appeal that petitioner's co-arrestee had consented to a search of a vehicle and their hotel room, did the Government's mere invocation of the "automobile exception" to the requirement of probable cause relax its burden to prove the existence of probable cause where the facts undeniably demonstrate that the information giving rise to the claim of probable cause arose after a search of the vehicle in which petitioner was riding and then, based on information there obtained, a search of petitioner's hotel room?

(2) Whether use of a 21 U.S.C. § 851 "information" to double petitioner's mandatory minimum sentence from 10 to 20 years violated petitioner's due process rights reaffirmed by this Court's decision in *United States v. O'Brien*, 130 S.Ct. 2169, 176 L.Ed.2d 979 (5/24/2010), holding that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a defendant is exposed." This is especially pertinent here, where a significant question as to whether the Government meet its burden of proving beyond a reasonable doubt the existence of a prior *conviction* when it solely relied upon a document replete with errors and conflicting information rather than seeking to transcribe any of the state proceedings to clarify whether or not petitioner had a prior felony conviction.

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Petitioner Aaron Williams ("Petitioner") respectfully petitions that this Honorable Court grant its writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion affirming Petitioner's conviction and sentence is reported at: *United States v. A. Williams*, 616 F.3d 760 (8th Cir. 2008) (See App. 1a-7a).

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit Court of Appeals in *Williams* was entered on August 5, 2010.

On application to a Justice of this Court, the time for filing a petition for writ of certiorari was enlarged until January 24, 2011.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

> place to be searched, and the persons or things to be seized.

U.S. Const. amend. V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; * * *.

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * *.

21 U.S.C. § 851. Proceedings to establish prior convictions

> (a) Information filed by United States Attorney
> (1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. . . .

* * *

(c) Denial; written response; hearing

(1) * * * The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. . . . The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. . . .

STATEMENT OF THE CASE

Petitioner Aaron Williams was charged with three others in a suppressed indictment charging all with conspiracy to distribute and possess with intent to distribute a quantity of heroin in excess of one kilogram in violation of 21 U.S.C. §§ 841(a)(1) and 846.

DEA special agent Brett Johnson testified that he had received information about a task force drug investigation going on in Los Angeles, California. As a result of that information, an independent investigation was launched in the St. Louis area. Court authorized wiretaps were conducted along with periodic surveillance of various individuals in an attempt to identify the persons on the overhears. Cell phones belonging to almost all members of the conspiracy were tapped. However, there were no recorded or overhears of calls to or from petitioner nor his name uttered.

All knowledge concerning petitioner was acquired by the Government after he was arrested on Sunday,

October 21, 2007, around 11:15 p.m., after being stopped and seized heading to a nightclub. Petitioner and Hicks left the Adams-Mark Hotel in St. Louis, Missouri around 11 p.m., petitioner a passenger in a red Toyota Solara. A government-installed device had been placed on their car four hours earlier when it was parked in the hotel garage but the tires did not immediately deflate. They were eventually pulled over on the interstate by several unmarked government vehicles. Petitioner and Hicks (who died about a year before trial), were immediately removed from their vehicle and placed face down on the ground and handcuffed behind their backs. The agents were in plain clothes and had their guns out. After being pulled into a sitting position, an officer named Churchwell testified that he Hicks if he could search the car and that Hicks told him - "go ahead." Churchwell said Hicks also later gave him permission to search their hotel room. A bag containing $62,496.00 in currency was found in an opening under the rear seat arm rest in the vehicle. No controlled substances were found. Petitioner's fingerprints were not found on any contraband.

After being processed, petitioner and Hicks were released and they returned to Chicago. After the indictment was unsealed, petitioner was arrested on October 9, 2008.

The St. Louis investigators focused on the drug distribution network of Kenneth Drones. To connect petitioner to Drones' drug distribution network, they relied on a woman, Cardia Johnson. She had plead guilty to drug conspiracy charges and was hoping for a sentence reduction by virtue of her testimony against petitioner. She claimed to know petitioner, claiming

she met him in Chicago once and at a meeting in November of 2006. The second meeting did not appear in any DEA reports or discovery. She also claimed she had called either Hicks or petitioner on her cell phone on October 21, but could not remember petitioner's cell phone number. No government recording of such a call was produced or used at trial. She admitted that she did not even know petitioner's or his cousin's names, and testified that on October 21, 2007, petitioner and Hicks were driving a beige car, not a red Toyota. Agent Johnson was unaware of any beige or yellow cars involved with petitioner.

Johnson testified that she would bring sealed packages to petitioner which she believed to be money though she never actually saw it. She wrote a letter to the district court expressing her anger over the fact that her sister, Norma Hubbard, received a lighter sentence. Hubbard did not testify.

Agent Johnson in his report wrote that he saw a black male put a bag in the back of the red Toyota and that he did not know whether it was petitioner or Hicks. Later, he testified that he saw petitioner as a passenger in the red Toyota lean down and grab a white plastic bag and throw it over his shoulder into the back seat.

Jane Holmes was called by the government. She lives in Chicago and met petitioner there. She had recently plead guilty to conspiracy to possess heroin with intent to distribute but was not yet sentenced. The amount was at least 10 but less than 30 kilos. Her agreement required her to be truthful in the sole judgment of the government. She said she asked petitioner to supply heroin to Drones. She said

originally she would obtain a hotel room in Chicago and Drones' associates would come from St. Louis with money and she would call petitioner to come with the drugs. She was using heroin at the time. Over time the number of transactions increased. She estimated the amount of drugs from the size of the packages and would help count the money. She claimed that at one point petitioner could not obtain drugs and she got them from one of petitioner's brothers who was cheaper. No evidence was introduced as to this claim. She was arrested sometime after meeting petitioner in Chicago with Hicks in late October, after petitioner had been released in St. Louis. She was aware she was facing a 10 year sentence.

Below, the government claimed that "after identifying Aaron Williams and Johnny Hicks, investigators ran criminal history checks" to account for the massive display of force on the highway when petitioner and Hicks were removed from their vehicle. However, Agent Johnson admitted that by 11:00 p.m. that Sunday night, all he knew was Hicks' name. Of many photos taken by the DEA, none portrayed petitioner getting in or out of a red Toyota at the Adams-Mark Hotel. Agent Churchwell participated in the stop of the vehicle and the seizure of its occupants. He revealed that his team did not even have a hotel room number for petitioner and Hicks until the roadside search. Churchwell himself retrieved the room key during that search, and personally conducted the hotel room search, using that key. He said it was then that he found the paperwork with petitioner's and his cousin's names, long after the search and seizure.

On May 6, 2009, a jury found petitioner guilty. The next day it returned a verdict of guilty on forfeiture. A

sentencing hearing was held on August 25, 2009 and the court, after reviewing written submissions and hearing argument of counsel, ordered petitioner to serve 262 months in the Bureau of Prisons followed by 10 years of supervised release and forfeiture of $1,000,000. Notice of appeal was filed on September 4, 2009.

REASONS FOR GRANTING THE WRIT

1. Mere Invocation of the "Automobile Exception" to the Requirement of Probable Cause Does Not Relax the Burden on the Government to Prove the Existence of Probable Cause in the Officer Authorizing the Arrest.

Plainclothes police in unmarked vehicles seized petitioner at gunpoint at 11:15 p.m. on October 21, 2007, removing him from the vehicle in which he was a passenger, along with the driver, Johnny Hicks, handcuffing both behind their backs and placing them face down on the side of the highway some distance from the vehicle.[1] They had stopped the vehicle using a deflation device they attached to the vehicle four hours earlier that day, puncturing its tires. They had no search or arrest warrants and conceded no attempt had been made to obtain any warrants. The vehicle was not violating any traffic laws and no tickets were written. Neither petitioner nor Hicks violated any laws in the presence of the police and neither threatened the police with any harm.

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[1] The term "police" is used to simplify reference to the various federal and state joint task force members here.

Initially, the Government argued consent: that despite the circumstances, the deceased co-arrestee gave free and voluntary consent sitting on the side of the road, surrounded by numerous government agents whose weapons were drawn - consent to search of the vehicle - finding a bag containing some $62,000 in cash was found inside a rear seat armrest compartment and a hotel room key and related information - and to a search of petitioner's and Hicks' hotel room. Neither petitioner nor Hicks was armed.

Petitioner raised on direct appeal the *Crawford/Davis* problem inherent in permitting testimony as to such consent because the alleged consenting party (Hicks) had died long before trial, as well as challenging the "voluntariness" of it. *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2008). The consent claimed occurred after petitioner and his cousin, Hicks, had been constitutionally seized. *Brendlin v. California*, 551 U.S. 249, 257-58 (2007); *California v. Hodari D.*, 499 U.S. 621 (1991). The Eighth Circuit avoided these issues by finding that there was probable cause to arrest arising just before installation of the deflation device. (App. 7a) Under the circumstances here, the court below affirmed an unconstitutional search and seizure. The rule announced by this Court for vehicle searches is simple but was ignored:

> "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an

> arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Arizona v. Gant, 129 S.Ct. 1710, 1723-24, 173 L.Ed.2d 485, 501 (2009).

At oral argument the government relied on the "automobile exception" to the Fourth Amendment's warrant requirement rather than consent. (App. 6a) It argued that its agents had a "reasonable suspicion" to stop the vehicle in which petitioner was riding and to arrest the occupants in the course of an "investigative stop." Alternatively, it claimed probable cause which the court below adopted, that there was probable cause to believe (a) that the proceeds of a crime were in the vehicle and (b) probable cause to arrest Hicks and petitioner existed.

Implicitly, both the opinion and the government substantially rely on the "fellow officers rule" in finding the existence of probable cause for the arrest and therefore the search. But the facts under that analysis do not pass constitutional muster and the opinion ignores that *Gant* did not change the rule that it is the government's burden justify exceptions to the warrant requirement not the defendant's to overcome.

The conclusion that there was probable cause to arrest petitioner some four hours earlier is based on several mistakes as to the nature of and scope of evidence adduced below. The following is clear: (1) no one testified that petitioner engaged in a "transaction"with Cardia Johnson. (App. 7a, 8a) There were no surveillance photographs of petitioner getting in or out of the Toyota or being anywhere else on the

date of the arrest. Cardia Johnson, the government's key witness as to petitioner's alleged involvement, never got out of her car when she stopped and talked to "two subjects" in white tee shirts near 7th and Market who then got in her car and drove with her to the Adam's Mark turn around where one subject got out. The record is completely vague as to who these two "subjects" were. Consequently, if this was the "transaction" referred to in the opinion, *i.e.*, the point where petitioner allegedly received money, such receipt was unobserved by Agent Johnson or any other law enforcement officer nor was it attributable to petitioner. Indeed, the government's own witnesses conceded that all surveillance broke down for at least four to six minutes as Cardia Johnson allegedly drove the subjects to the hotel. The government "exception" argument appears to be that when it lost surveillance monies were passed to petitioner or Hicks though no one testified to witnessing any exchange. The record is clear that it is at the Adam's Mark that petitioner and presumably Hicks were seen getting into a red car and following Cardia Johnson to a Hooter's restaurant and parking. But, though fully armed with a camera with telephoto lenses, used throughout the day, Agent Johnson did not take any pictures of petitioner near the Hooters showing him getting into Cardia Johnson's car and then returning to the Toyota. And there is no testimony that petitioner was ever seen leaving Cardia Johnson's vehicle carrying a large full white plastic shopping bag and returning with it to the Toyota. The agents conceded they saw no money or packages exchanged. Agent Johnson did not go into the hotel parking garage and though it was hours before petitioner and Johnny Hicks were arrested, he did not seek a warrant. The bag found in the Toyota had no fingerprints matching petitioner though testing was

done. And earlier, when Hicks and petitioner returned to the hotel from Hooters there is no testimony that petitioner was ever seen holding anything, much less a large full white plastic bag, such as the one described by Agent Johnson. There was no evidence of any cell phone call to or from petitioner and Cardia Johnson at any time, much less a "warning call." (App. 8a) Nor was there any evidence of any call from Kenneth Drones or members of his drug ring to petitioner or Hicks. So the opinion's untethered conclusion that petitioner was the "boyfriend" referenced in several intercepted phone calls between Drones and Cardia Johnson and not Johnny Hicks or some else is unfounded. And no evidence supports the opinion's claim that petitioner received a "warning call" from Cardia Johnson. No intercept documents support the statement.

The "fellow officer rule" is not without limitations. In *Whiteley v. Warden*, 401 U.S. 560 (1971), this Court limited the "fellow officer rule" holding that there must be a showing of grounds for a warrantless arrest either in the hands of the arresting officer or in the agency or officer who prompted the arrest to be made, here Agent Johnson. Failure to make the showing requires exclusion. *See, e.g., U.S. ex rel. Mungo v. LaVallee*, 522 F.2d 211 (2d Cir. 1975). Here, the necessary showing was not made. First, the law enforcement information "chain" was too long and unconnected to either petitioner or Hicks until the evening of arrest. While the government and the opinion note the length of the investigation and surveillance, that fact alone requires greater - not lesser - caution in determining the existence or nonexistence of probable cause under this doctrine. *See Bennett v. City of Grand Prairie*, 883 F.2d

400 (5th Cir. 1989); LAFAVE, SEARCH AND SEIZURE, V. 2, § 3.5, p. 269 (West, 2004).

Such caution is especially applicable here where despite the existence of the long continuing surveillance and intercepts, there is no mention of petitioner or Hicks. Petitioner argued that the question was what did the arresting officer know or the officer(s) who ordered the arrest know at the time of the arrest? The court below found that the question was what did the police know at 7:00 p.m. when they ordered the deflation device to be attached to the Toyota in the parking garage. But then the question is triggered as to why no arrest or search warrant was obtained.

But Agent Johnson did not have probable cause at the time that he ordered the disabling device installed. That action plainly constitutes an exercise of control over the vehicle and its occupants. And the reason is that he played fast and loose with the facts. The one fact he relied on is his claim that he saw the man in the passenger seat of the Toyota reach down in front of himself and throw a bag into the rear seat. Petitioner weighed close to 400 pounds on October 21, 2007 and it is unrealistic to imagine him moving to and from vehicles in the manner suggested by the police or bending. More important, no bag was found in the back seat, it was found in a "void" under the rear right arm rest.

Agent Churchwell at the arrest and seizure admitted that it was not until he began searching the vehicle and found papers and/or a hotel key in it that he learned the name of the driver and his hotel room - "there was a hotel key or some paper work found in the

vehicle." He also had the occupants' wallets and identification after the arrest. The question must be raised: if Agent Johnson possessed probable cause at the time the deflation device was installed on the vehicle, hours earlier, why wasn't the room number known until Churchwell found the key or paper work in the Toyota and returning to St. Louis and conducting the room search himself. Petitioner never argued that law enforcement had to know his name to arrest im and search the vehicle in which he was a passenger. Rather, the point was that if Agent Johnson had probable cause to believe petitioner was Kenneth Drones' supplier, if he and his staff were monitoring the Drones group's cell phones in St. Louis, they should have known petitioner's name - but they did not. There were no calls referred to at trial or pretrial from Drones or any of his associates to petitioner or his cell phone.

Equally significant, the money found in the Toyota was not found in the back seat where Agent Johnson claimed he saw petitioner toss it, but in a "natural void" - that is, a hole under a rear arm rest. When did this movement of the taped money occur and who did it? Indeed, when the deflation device was installed in the garage, the agents who installed the device should have seen through the windows of the vehicle a full white plastic shopping bag in the back seat of the vehicle. That would have supported probable cause to search. But there was no such testimony. And if petitioner was supplying Kenneth Drones, who pled guilty, why wasn't Drones called by the government to so testify?

This Court should grant its writ in order to clarify and mandate proper application of its recent decision

in *Arizona v. Gant* and guarantee that the prohibition against unreasonable searches and seizures cannot be avoided by rote invocation of the automobile exception and ignoring all of the other factors militating against it.

2. Does a 21 U.S.C. § 851 information doubling a defendant's mandatory minimum from ten to twenty years, where the proof of the prior conviction contains substantial inaccuracies and conflicting information, without benefit of a jury finding, violate Petitioner's rights of due process and trial by jury, and even if not, did the proof here rise to the level of proof beyond a reasonable doubt, as required by the statute.

Pursuant to 21 U.S.C. § 851, the government filed on the eve of trial its notice of a purported prior felony conviction of petitioner from the Criminal Division of the Circuit Court of Cook County, Illinois. (App. 5a) The district court noted that if petitioner's Cook County, Illinois record constituted a conviction, "that would change the sentencing posture of this case," referring to the twenty-year mandatory minimum triggered upon proof. Before oral argument but after briefing in the Eighth Circuit, this Court's decision in *United States v. O'Brien*, 130 S.Ct. 2169, 176 L.Ed.2d 979 (05/24/2010) was entered. Petitioner referred to the decision in his oral argument on the § 851 finding but no mention of it was made in that court's opinion. Petitioner elaborated upon the impact of the decision in a petition for rehearing which was denied without comment or modification of the original opinion.

Petitioner's sentencing hearing was held on August 25, 2009, and though the court rejected the

government's request for a "Guidelines" sentence of 360 months, imposing a sentence of 262 months, the key finding was that petitioner had a prior felony conviction and was therefore subject to a mandatory minimum sentence of "20 years in jail, and a maximum term of life imprisonment."

This Court was clear in *O'Brien*: it is fundamental to our jurisprudence that the elements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt. *Hamling v. New York*, 418 U.S. 87, 117 (1974); *Jones v. United States*, 526 U.S. 227, 232 (1999). It is equally clear that "sentencing factors . . . can be proved to a judge at sentencing by a preponderance of the evidence." *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986). A § 851 notice or "information" is not a "sentencing factor," as it doubles the bottom line one faces at sentencing. As the Court noted in *O'Brien*, apart from the one exception set out in *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998), "'[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" *Id.*, 130 S.Ct. at 2174.

Under § 851, Congress provided that where the government gives notice and proves to the court the existence of a prior conviction beyond a reasonable doubt, the mandatory minimum in the instant prosecution doubled from ten to twenty years. As Justice Thomas wrote concurring in *O'Brien*, anything that increases or alters a defendant's statutorily mandated sentencing range must be submitted to a jury. *Id.*, 130 S.Ct. at 2183-84. That did not occur here where the "alteration" was profound. To move from a

ten year to a twenty year mandatory minimum on the basis of a prior conviction - here one not even supported by so much as a transcript even though all felony courtrooms in this country are courts of record - without permitting a jury to make that decision violated petitioner's right to trial by jury and his Fifth Amendment right to have the "notice" placed in the indictment.

The constitutional error was magnified by the nature and quality of the so-called evidence the government relied upon - the government attached to its "Criminal Information" a document titled: CERTIFIED STATEMENT OF CONVICTION/ DISPOSITION. (App. 54a) It then argued simply that - "[I]t's the Government's position that because probation was unsuccessfully completed, this charge was not dismissed, and therefore is a state conviction and satisfies the – it is possession of a controlled substance prior, it is a felony prior, and the Government's information is valid." Defense counsel argued that the conviction was not "final" and second, questioned whether or not the offense charged was a felony. The district court found that the offense charged was a felony under Illinois law.

The only record introduced demonstrates the government's failure of proof. It is undisputed that the certified disposition record shows the abbreviation, "JW" translated as "judgment withheld." This document, solely responsible for moving a man's minimum sentence from ten to twenty years, is fraught with contradictory minute entries raising serious questions as to what was occurring in the Illinois proceedings. Rather than order the transcripts which were available, such as ordering the transcript

for 09/19/1990 demonstrates the serious weakness of proof.[2]

Examining the document, it reflects that petitions for violation of probation were filed on December 18, 1991, and June 24, 1992. It then shows "REINSTATEMENT - VIOL PROBATION" on October 23, 1992. The government argued in the district court that the period of probation was one year. If correct, then the record entries show that the probation expired long before the violation was adjudicated raising the issue of the court's jurisdiction to enter any findings. There are no entries purporting to extend the period of probation.

The document indicates that petitioner was placed on probation on 9/19/90 and was not taken into custody until 8/28/91 when he was released on bond nearly a year later. While time in custody may be excluded from probation, here the record shows petitioner's bond was refunded to him on 11/22/91. Then, almost a month later, on 12/18/91, he is placed on bond again and another violation filed. The purported one year period of probation would have expired. And on 10/23/92, the document states "REINSTATEMENT - VIOL PROBATION." The plain reading is that petitioner was returned to probation at some point between 6/24/92 and 10/23/92, lending support to petitioner's contention that the duration of probation was not one year.

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[2] As the government filed its "information" on the eve of trial, there was little opportunity for petitioner's counsel to obtain all of the transcripts for the 16 year old proceedings.

Finally, on 08/28/91 there is an entry "CHANGE IN PRIORITY STATUS" and on the same line, the initial "M" appears, indented the same as the "F" that the government argued stood for felony. This would thus arguably appear to mean that petitioner's charge was reduced to a misdemeanor. Such a reading is consistent with the refund to appellant of his bond on finding a violation.

This is not the quality of evidence sufficient to prove beyond a reasonable doubt the existence of a prior felony *conviction* and the district court's finding violated the reasonable doubt standard. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The government failed to prove beyond a reasonable doubt that petitioner was ever convicted in Illinois of a prior felony offense and the record introduced by the government on its face shows that any probation imposed and revocation thereof were void.

CONCLUSION

For all of the reasons stated above, petitioner prays that this Court grant its writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered below.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 09-3126

[Filed August 5, 2010]

United States of America,	)
	)
Appellee,	)
	)
v.	)
	)
Aaron Williams,	)
	)
Appellant.	)
	)

Submitted: June 15, 2010
Filed: August 5, 2010

Before MURPHY, BEAM, and BENTON, Circuit Judges.

BEAM, Circuit Judge.

Following the denial of Aaron Williams's motion to suppress evidence seized during a warrantless arrest

and search of a vehicle in which he was a passenger, a jury found Williams guilty of conspiracy to possess with intent to distribute in excess of one kilogram of heroin. The district court[1] sentenced Williams to 262 months' imprisonment, ten years' supervised release, and ordered forfeiture of $1 million. Williams appeals and we affirm.

I. BACKGROUND

During the course of a Los Angeles, California, investigation into individuals trafficking drugs, Drug Enforcement Agents (DEA) in St. Louis learned of some "overlap" in their area and began wiretapping Kenneth Drones's telephone, among others, to investigate a heroin trafficking conspiracy. Drones was a mid-level heroin supplier in the St. Louis area. Cardia Johnson served as both Drones's drug courier and as a go-between for Drones and his supplier, Williams. The investigation leading up to the day's events at issue in this case was extensive, including months of wiretap and physical surveillance, vehicle searches, and other police activity.

On October 21, 2007, agents intercepted a call between Drones and Johnson in which Drones asked Johnson if she had talked to her "boyfriend," apparently a reference to Drones's supplier, Williams. Subsequent calls revealed that Drones's supplier was in St. Louis and that Johnson would be meeting with Drones to obtain money to take to the supplier. An

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[1] The Honorable Catherine D. Perry, Chief Judge, United States District Court for the Eastern District of Missouri.

agent conducting physical surveillance observed Johnson enter Drones's residence and exit with a white plastic bag that appeared to be full. Johnson then traveled to downtown St. Louis, picked up two individuals and drove a short distance to the Adam's Mark Hotel, where the two individuals, later identified as Williams and Johnny Hicks, took the money. Williams and Hicks then traveled in a red Toyota, following Johnson around the corner near a Hooters restaurant, where Williams reentered Johnson's vehicle and gave her a package. As the two cars were en route, agents intercepted a call between Johnson and Drones in which Johnson told Drones that there was a problem and that "he" was not willing to go forward. Johnson asked Drones whether she should "come back and get that" and Drones told her to "come back and get it." After the encounter near Hooters, the Toyota drove away and a pursuing agent observed Williams throw a white plastic shopping bag into the back seat of the Toyota.

The Toyota returned to the Adam's Mark Hotel and agents continued surveillance and learned that Johnny Hicks of Chicago, Illinois, rented a room in the hotel that day for cash. Agents intercepted additional calls between Johnson and Drones discussing the problem with the money Drones provided to Williams and Hicks in exchange for heroin. Later that evening, agents observed Johnson enter the Adam's Mark Hotel and exit a very short time later. Agents then stopped Johnson's vehicle and found $1,000 in currency in her purse. Based on their experience, the agents believed the money represented a courier fee. Following this stop, Johnson called Drones and told him she had been stopped and that she was nervous. She further

explained that she called to warn the supplier about her stop and possible police activity.

Based on the above information, agents decided to make a traffic stop of the Toyota. To avoid a pursuit in downtown St. Louis, agents placed a tire deflation device on the Toyota. After the intercept of Johnson's call to Drones explaining that she had warned the supplier, Hicks and Williams left the hotel in the Toyota and proceeded onto the interstate. Agents pulled over the Toyota as its tires deflated. Then, they removed Hicks (the driver) and Williams (the passenger) from the vehicle and handcuffed them. Next, an agent asked Hicks for consent to search the vehicle as well as the hotel room, and Hicks replied, "go ahead." A search of the Toyota revealed a white plastic sack containing $62,496.00 in currency in the rear compartment of the vehicle on the passenger side.

Williams was subsequently charged with conspiring to distribute and possession with intent to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 846, and criminal forfeiture under 21 U.S.C. § 853. Williams filed a motion to suppress any evidence or statements arising out of the automobile stop. The court denied Williams's motion to suppress and, after a three-day trial, a jury found Williams guilty of the conspiracy to possess with intent to distribute charge. During the sentencing phase, the government sought the application of a mandatory minimum sentence of twenty years' imprisonment under 21 U.S.C. § 841(b)(1)(A) based on Williams's previous Illinois

state felony drug conviction.[2] Williams objected, but the district court overruled his objection and applied the mandatory minimum sentence. The court then calculated Williams's guidelines range at 360 months to life, but applied a downward variance and sentenced Williams to 262 months' imprisonment, ten years' supervised release, and ordered forfeiture of $1 million.

Williams appeals the court's pretrial denial of his motion to suppress, and his ultimate judgment and conviction, claiming that the search of the vehicle in which he traveled on the day in question was unconstitutional, and that the court erred in applying the mandatory minimum twenty-year sentence under 21 U.S.C. § 841(b)(1)(A).

II. DISCUSSION

A. Motion to Suppress and Constitutionality of Search

Williams first argues that the district court erred in denying his motion to suppress evidence from the search of the vehicle in which he was a passenger because any alleged consent to search given by the driver of the vehicle was involuntary, or in the alternative, the police lacked probable cause for the warrantless arrest and subsequent search. As a result, Williams claims, his judgment of conviction must be

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[2] Before trial, the government properly filed an information with the court and attached a certified copy of Williams's prior conviction. See 21 U.S.C. § 851(a) (notice requirements for using prior convictions to enhance sentences).

vacated and the matter remanded for a new trial free from the tainted evidence. Because the search was lawful, however, we have no occasion to visit Williams's consent claim.

"In reviewing a denial of a motion to suppress, we review the district court's factual determinations for clear error and its legal conclusions *de novo*." United States v. Parish, 606 F.3d 480, 486 (8th Cir. 2010). "Because this case proceeded to trial, we examine the entire record, not merely the evidence adduced at the suppression hearing, in considering the denial of [Williams's] motion to suppress." United States v. Inman, 558 F.3d 742, 745 (8th Cir.), cert. denied, 130 S. Ct. 304 (2009). "The existence of probable cause is a mixed question of law and fact that we review *de novo*." Parish, 606 F.3d at 486.

Searches conducted without a warrant are per se unreasonable, subject to a few well-established exceptions. United States v. Madrid, 152 F.3d 1034, 1037 (8th Cir. 1998). One such exception is the "automobile exception." The Supreme Court has held "that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" Arizona v. Gant, 129 S. Ct. 1710, 1719 (2009) (quoting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in judgment)); United States v. Winters, 600 F.3d 963, 968 (8th Cir. 2010). "[T]he offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." Id. The government bears the burden of establishing that an exception to the

warrant requirement applies. Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).

Given the above, our first inquiry is whether the police had probable cause to arrest Williams. "'Probable cause to make a warrantless arrest exists when, considering all the circumstances, police have trustworthy information that would lead a prudent person to believe that the suspect has committed or is committing a crime.'" Parish, 606 F.3d at 486 (quoting United States v. Velazquez-Rivera, 366 F.3d 661, 664 (8th Cir. 2004)). Here, the officers had probable cause to arrest Williams. Williams argues that a lack of probable cause to arrest him is demonstrated by the failure of any mention of Williams during the months of wiretap surveillance leading up to the events on October 21, 2007. But, the fact that Williams's name had not yet been specifically mentioned to-date in the investigation is not dispositive. Nor is the fact that the officers did not "know" Williams at the time they stopped the vehicle, which Williams intimates on appeal. Probable cause does not require certainty regarding Williams's identity. Cf. United States v. Muhammad, 604 F.3d 1022, 1027-28 (8th Cir. 2010) (reiterating that absolute certainty is not required by probable cause in the similar context of the plain-view exception to the Fourth Amendment search and seizure requirements).

At the time the officers witnessed Williams interacting with Johnson, they did not know his actual identity but he could certainly be reasonably identified by a prudent person as participating in a drug transaction and involved in the greater conspiracy at play. The officers had intercepted calls between Drones and Johnson, a supplier and suspected drug courier

respectively, wherein Johnson discussed obtaining money from Drones to give to Drones's own supplier who was currently in St. Louis. And, officers observed Johnson leave Drones's residence with a white plastic shopping bag and observed Johnson conducting a transaction with a man later identified as Williams. Williams then tossed a similar-looking white plastic shopping bag into the back seat of the identified vehicle. Later that evening, after Johnson returned to the hotel to give what officers believed was more money to the supplier, and after receiving a "warning" call from Johnson regarding suspected police activity, Williams left the hotel and got on the interstate traveling in the same vehicle he was seen in earlier. Given these events, a prudent person, especially in light of the ongoing extensive investigation leading up to that day's events, would be led to believe the men traveling in the Toyota had committed or were committing a drug crime. The circumstances of the investigation, the physical surveillance and the intercepted wiretap calls revealed Williams's participation in the heroin conspiracy.

Because the Toyota left the Adam's Mark after the day's transactions with Johnson, and in close temporal proximity to Johnson's phone conversation with Drones's supplier warning him of police activity, in addition to the surveillance of Williams tossing a white plastic shopping bag into the back seat of the Toyota after meeting with Johnson, the police had probable cause to believe that evidence relevant to the drug crime would be found in the vehicle. See Gant, 129 S. Ct. at 1719 (distinguishing Thornton, 541 U.S. at 618 and New York v. Belton, 453 U.S. 454, 456 (1981), where the defendants were arrested for drug offenses, from Gant, where the defendant was arrested for

driving with a suspended license, an offense for which there is "no reasonable basis to believe the vehicle contains relevant evidence"). In short, these officers had probable cause to believe that contraband or other evidence of drug crimes would be found in the stopped vehicle. Thus the search was constitutionally reasonable and we affirm the district court's denial of Williams's motion to suppress.

Because there was probable cause for the arrest and the search of the vehicle was not unreasonable, we need not determine whether the driver of the vehicle gave valid consent to search the vehicle.

B. Prior Conviction

At sentencing, the district court applied a mandatory minimum sentence of twenty years' imprisonment under 21 U.S.C. § 841(b)(1)(A) based on Williams's previous Illinois state felony drug conviction. On appeal, Williams claims the district court erred in its application of § 841(b)(1)(A). Specifically, Williams challenges the "finality" of the Illinois criminal record submitted in support of the enhancement application and argues that the government failed to support beyond a reasonable doubt the basis for the requested enhancement.[3] To

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[3] Williams also, in part, claims that his prior Illinois offense was not a "felony" for purposes of the enhancement, pointing to a notation of "M" on the Certified Statement following a notation of "Change in Priority Status," which Williams argues clearly indicates a misdemeanor and not a felony. But state law is not relevant to our inquiry. The critical historical fact for our purposes today is that, as the district court held, Williams pled guilty to the Illinois offense, the punishment for which meets the definition of

apply the enhancement under § 841(b)(1)(A), the government had the burden of proving beyond a reasonable doubt that Williams committed the present offense "after a prior conviction for a felony drug offense has become final." 21 U.S.C. §§ 841(b)(1)(A), 851(c)(1). To satisfy its burden here, the government submitted a Certified Statement of Conviction/ Disposition from Cook County, Illinois, which was a multi-page document containing multiple "minute entries" and truncated court notations. Williams claims the government relied upon "an obviously incomplete and/or inaccurate record as its sole support for doubling the mandatory minimum from ten years to twenty," and thus failed to meet its burden.

"Because resolution of this claim requires us to interpret [21 U.S.C. § 841(b)(1)(A)], we review de novo the district court's use of . . . prior convictions for enhancement purposes." United States v. Stallings, 301 F.3d 919, 920 (8th Cir. 2002) (quotation omitted).

"felony" under federal law. See 21 U.S.C. § 802(44) ("Felony drug offense" is defined by statute as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.") Even if the Illinois court later changed its notation, or even if it had expunged Williams's record altogether, the initial plea satisfies the enhancement in this case. See Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 115 (1983) (discussing this issue in the context of an application for a license as a firearms and ammunition dealer and manufacturer, regulated by the Gun Control Act of 1968, which made it unlawful for a person convicted of a crime punishable by imprisonment for a term exceeding one year to receive). We thus affirm the district court's conclusion that the Illinois offense was a felony for purposes of the enhancement.

"[T]he determination of what constitutes a 'final conviction' for purposes of section 841(b) is a question of federal law." United States v. Slicer, 361 F.3d 1085, 1087 (8th Cir. 2004). Thus, Williams's argument regarding what constitutes a "conviction" in Illinois, is inapposite.

Williams points to several ambiguous notations on the Certified Statement, attempting to raise doubt as to the finality of his conviction. However, based on the Conviction/Disposition, it is clear that (1) Williams was charged with felony possession of a controlled substance in Cook County, Illinois, (2) he pled guilty to that crime, (3) he was sentenced to probation, and (4) he was found guilty of violating his probation. In United States v. Ortega, we held that "deferred adjudications or probated sentences constitute convictions in the context of § 841." 150 F.3d 937, 948 (8th Cir. 1998) (quotation omitted). There, we found a prior "final conviction" under § 841(b) where the defendant was found guilty and was required to serve three years of supervised probation, but also received a suspended imposition of sentence. Moreover, we determined that the defendant's prior conviction was "final" even though a motion to withdraw his guilty plea for the prior offense was pending in state court. We explained, "we will consider [defendant's] guilty plea final until such time as the state court grants its motion." Id.

Also instructing our determination is an analysis conducted by the Seventh Circuit in United States v. McAllister, 29 F.3d 1180, 1185 (7th Cir. 1994). There, the Seventh Circuit determined whether the defendant's prior Illinois state offense constituted a "prior conviction" under § 841(b). A defendant in

McAllister pled guilty to a felony drug offense under Illinois law, was sentenced to probation, and completed the terms/conditions of his probation and was discharged. Due to the successful completion of his probation and discharge, his offense was not treated as a "conviction" under Illinois law. Id. Even so, the Seventh Circuit reasoned that "[p]robation is not imposed upon someone who is not guilty of a crime," and held that "probation is a conviction under § 841(b)(1)(B)." Id.

Therefore, under this circuit's precedent, including our reasoning in Ortega, and instructed by our sister circuit's analysis in McAllister, Williams's Illinois drug offense constitutes a final, prior conviction for a felony drug offense under § 841(b)(1)(A). We affirm the district court's application of the enhancement.

III. CONCLUSION

For the reasons stated herein, we affirm.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-3126

United States of America,

Plaintiff - Appellee

v.

Aaron Williams,

Defendant - Appellant

Appeal from U.S. District Court
for the Eastern District of Missouri - St. Louis
(4:08-cr-00566-CDP-1)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

August 05, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

AO 245B (Rev. 06/05) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Case Number: 4:08CR00566 CDP
USM Number: 40727-424

[Filed August 25, 2009]

UNITED STATES OF AMERICA	)
	)
V.	)
	)
AARON WILLIAMS	)
	)

JUDGMENT IN A CRIMINAL CASE

James M. Martin
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) One (1) of the Indictment by a jury trial on May 6, 2009 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 USC 841 (a)(1) and 843	Conspiracy to Distribute and Possess with the Intent to Distribute Heroin	September 24, 2008	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in the economic circumstances.

August 25, 2009
Date of Imposition of Judgment

/s/ Catherine D. Perry
Signature of Judge

Catherine D. Perry
U. S. DISTRICT JUDGE
Name & Title of Judge

August 25, 2009
Date signed

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 262 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

that the defendant be placed at FCI - Pekin or as close to Chicago, Illinois as possible, if consistent with Bureau of Prison policies.

☒ The defendant is remanded to the custody of the United States Marshal.

* * *

MARSHALS RETURN MADE ON SEPARATE PAGE

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Ten Years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

☒ The defendant shall not possess a firearm, as defined in 18 U.S.C. § 921. (Check if applicable.)

* * *

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any

controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

WHILE ON SUPERVISION, THE DEFENDANT SHALL COMPLY WITH THE STANDARD CONDITIONS THAT HAVE BEEN ADOPTED BY THIS COURT AS WELL AS THE FOLLOWING ADDITIONAL CONDITIONS:

1. The defendant shall refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of commencement of supervision and at least two periodic drug tests thereafter for use of controlled substances.

2. The defendant shall submit his person, residence, office, or vehicle to a search conducted by the United States Probation Office at reasonable times and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

3. If not obtained while in the custody of the United States Bureau of Prisons, the defendant shall participate in GED classes as approved by the United States Probation Office.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6

	Assessment	Fine	Restitution
Totals:	$ 100.00	_____	_____

* * *

If a defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:	_____	_____	

* * *

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $100.00 due immediately, balance due

* * *

IT IS FURTHER ORDERED that the defendant shall pay to the United States a special assessment of $100, that shall be due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

* * *

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

Under Fed. R. Crim P. 32.2, the defendant shall pay a Money Judgment in the amount of $1,000,000.00.

Payments shall be applied in the following order: (1) assessment; (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

[*United States Marshal Return of Judgment in a Criminal Case omitted in printing this appendix*]

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:08CR566 CDP

[Filed March 31, 2009]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
AARON WILLIAMS,	)
	)
Defendant.	)
	)

MEMORANDUM AND ORDER

This matter is before the Court on defendant Aaron Williams' pretrial motions. Pursuant to 28 U.S.C. § 636(b), the motions were referred to United States Magistrate Judge Thomas C. Mummert. Judge Mummert held a hearing on January 26, 2009, and thereafter filed his Report and Recommendation regarding the defendant's motions. Defendant Williams has filed objections to Judge Mummert's recommended rulings.

I have considered the motions *de novo*, including listening to the recording of the hearing before Judge Mummert (even though no evidence was adduced), reviewing fully the parties' arguments, and reviewing the law. I will overrule defendant's objections except on one point. I believe that under Supreme Court precedent, Williams does have standing to challenge the stop and subsequent search of the vehicle in which he was a passenger, and so I will hear evidence on the motion to suppress. Otherwise, I will adopt and sustain the thorough reasoning of Magistrate Judge Mummert set forth in support of his recommended rulings issued on January 30, 2009.

Williams argues that Judge Mummert erred in ruling that he did not have standing to seek to suppress money that was seized from a bag in a car in which he was the passenger. I agree that under *Brendlin v. California*, 551 U.S. 249 (2007), Williams, as the passenger in the car, was seized, and therefore has authority to challenge the legality of the automobile stop. If the stop was unlawful, the money found in the bag would have to be suppressed. I do not believe that Williams has to assert that it was his bag to challenge the initial stop of the vehicle. This is a different situation than arose in the Eighth Circuit cases cited by the magistrate judge, in which defendants attempted to challenge seizures made from other people. Unlike things found directly on a person, as in those cases, the bag here was apparently in the automobile, and thus could have been in the possession of either or both occupants of the vehicle. I will therefore not adopt this portion of Judge Mummert's Report and Recommendation, and instead will hear

evidence on this motion at the final pretrial hearing in this case.[1]

Certain of Williams' motions are moot. He sought to suppress pretrial statements, but none were made. He sought severance and a separate trial, but because all co-defendants have either pleaded guilty or indicated their intention to do so, there is nothing to sever, and he will be the only defendant tried in this case. The other rulings entered by Judge Mummert are entirely correct, and require no further discussion.

Accordingly,

IT IS HEREBY ORDERED that the Report and Recommendation of the United States Magistrate Judge [#97] is sustained in part.

IT IS FURTHER ORDERED that defendant's motion to sever [#72] is denied as moot, and his motions for early production of Jencks Act materials [#70] and for a bill of particulars [#75] are denied.

IT IS FURTHER ORDERED that the Court will conduct a final pretrial conference and a hearing on remaining motions (including any evidence to be presented on the motion to suppress) in this matter on **Friday, April 24, 2009 at 1:00 p.m.** Defendant's presence is required at this hearing.

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[1] The government set out its version of the facts of the stop in its brief opposing the motion, and if those facts are proven at the hearing, the motion to suppress will be denied. But defendant argued that he had some reason to challenge the government's assertion that law enforcement officers had probable cause to stop the vehicle, and so an evidentiary hearing is necessary.

IT IS FURTHER ORDERED that the Court will conduct a telephone conference with counsel only (defendant's participation is not required) on **Thursday, April 2, 2009 at 11:00 a.m.** to discuss scheduling issues related to the trial. The Court will place the call, and if counsel are not expected to be available at his or their normal telephone numbers, they should notify my office promptly of the numbers where they can be reached.

/s/ Catherine D. Perry
CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 31st day of March, 2009.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:08CR0566 CDP/TCM

[Filed January 30, 2009]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
AARON WILLIAMS,	)
	)
Defendant.	)
	)

MEMORANDUM

This matter is before the Court on various motions filed by Aaron Williams ("Defendant"). An evidentiary hearing was held on January 26, 2009, at which Defendant appeared and was represented by James M. Martin. The Government was represented by Assistant United States Attorney Tiffany G. Becker. As will be discussed later in this memorandum, the Court determined that there was no requirement for testimony in Defendant's motion to suppress evidence and statements. Therefore, there are no findings of

fact regarding Defendant's motions. The memorandum herein contains a discussion on the legal arguments raised by Defendant.

Discussion

A. Defendant's Motion for Early Jenks Act Disclosure. [Doc. 70]

Defendant has acknowledged the receipt of extensive discovery. The Government has complied with its discovery obligations under the Federal Rules of Criminal Procedure. Moreover, the Government has acknowledged its burden to produce Jenks Act material and Brady[1] material.

Title 18 U.S.C. § 3500(b) provides that after a Government witness has testified, the Court shall, on the motion of the defendant, order the Government to produce any statement of that witness to the defendant. The Government has agreed to provide defendant with Jencks Material on the Friday prior to trial.

Defendant's motion is, therefore, denied as moot.

B. Defendant's Motion to Bar or Limit Use of Co-Conspirators' Statements. [Doc. 71]

This motion is more appropriately heard by the trial judge. The Government has advised the Court and defense counsel that it is aware of its limitations on the admissibility of these possible statements.

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[1]Brady v. Maryland, 373 U.S. 83 (1963).

Should the district judge choose to have the undersigned rule on this motion, the motion may be re-referred to the undersigned at the convenience of the Court.

C. Defendant's Motion for Severance from Other Defendants. [Doc. 72]

Defendant argues that he will be prejudiced by any admission into evidence from any statements or confessions by codefendants. Defendant further argues that he will be prevented from calling codefendants at trial as witnesses and that testimonial evidence may be introduced in trial that would possibly violate his right to confront witnesses.

"When a defendant moves for a severance, [the Court] must first determine whether joinder is proper under Federal Rule of Criminal Procedure 8. If joinder is proper, the [C]ourt still has discretion to order a severance under Federal Rule of Criminal Procedure 14." **United States v. Darden**, 70 F.3d 1507, 1526 (8th Cir. 1995). "These rules are to be liberally construed in favor of joinder." **Id.** (internal quotations omitted).

Rule 8(b) provides that multiple defendants may be charged in the same indictment if it is alleged that they participated in the same act or transaction constituting an offense or offenses.

Rule 14 provides that a defendant's trial may be severed from the trial of codefendants "[i]f it appears that a defendant or the government is prejudiced by a joinder." Fed.R.Crim.P. 14. "When joinder is proper under Rule 8, the defendant seeking a severance has

the burden to demonstrate how the joint trial prejudiced his or her right to a fair trial." **Darden**, 70 F.3d at 1527. Severance is to be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." **Zafiro v. United States**, 506 U.S. 534, 539 (1993). Severance is not to be granted merely because codefendants have conflicting defenses. **Id.** at 538. See also **United States v. Garrett**, 961 F.2d 743, 746 (8th Cir. 1992) (holding that the fact that each defendant has his or her own personal interest at stake is not a sufficient ground to require separate trials). Instead, the moving defendant must make a showing that a jury would be unable to compartmentalize evidence as it relates to each defendant. **Id.**

"Mere disparity of evidence against codefendants or the alleged prejudicial spillover effect of evidence against a codefendant are not grounds for severance absent a showing that the jury will be unable to compartmentalize the evidence against each individual defendant." **United States v. Kime**, 99 F.3d 870, 880 (8th Cir. 1996). Thus, codefendants charged in a conspiracy "'will generally be tried together . . . .'" **Id.** (quoting United States v. O'Meara, 895 F.2d 1216, 1219 (8th Cir. 1990)). "'Rarely, if ever, will it be improper for co-conspirators to be tried together . . . .'" **Id.** (quoting United States v. Drew, 894 F.2d 965, 968 (8th Cir. 1990)) (alteration in original).

Further, "severance is not required simply because the evidence against one defendant is more damaging than the evidence against another. Nor is severance required simply because evidence may be admissible

as to one defendant but not as to another." **United States v. Roach**, 28 F.3d 729, 738 (8th Cir. 1994) (internal quotations omitted). Accordingly, Defendant's general allegations of prejudice are not a sufficient basis on which to sever Defendant's case for trial. See **Id.** (affirming denial of severance to codefendant who failed to identify any evidence that would not have been admitted had she been tried alone). See also **United States v. Agofsky**, 20 F.3d 866, 871 (8th Cir. 1994) (affirming denial of severance on grounds that evidence that was presented at trial pertaining to only one defendant or the other did not prejudice either defendant because trial involved two defendants charged with three counts each and did not involve any complex issue).

Defendant also argues that he may be prejudiced at a joint trial if a codefendant's testimony exposes him to potential comments by defense counsel on any defendant's failure to testify; any requested instruction on any defendant's failure to testify; and any impeachment of any testifying defendant. These assertions are entirely speculative and therefore do not serve as any basis on which to grant a separate trial. See **United States v. Blum**, 65 F.3d 1436, 1443 (8th Cir. 1995) (analyzing and rejecting similar arguments). Further, should such circumstances arise, the Court may give cautionary instructions to the jury regarding its consideration of the evidence as to each defendant and directing the jury that no inference may be drawn from any defendant's failure to testify. See **United States v. Fregoso**, 60 F.3d 1314, 1328 (8th Cir. 1995) (finding no abuse of discretion in denying motion to sever where district court had given jury a limiting instruction); **United States v. Robinson**, 774 F.2d 261, 266-67 (8th Cir.1985)(same). See also Manual of

Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, §§ 3.05 and 4.01 (1994 rev. ed.).

Moreover, should the Government offer an inculpatory statement of a codefendant at trial, that statement may be redacted to eliminate any reference to Defendant, consistent with **Richardson v. Marsh**, 481 U.S. 200, 211 (1987). Accordingly, provided that the Government does so and the proper limiting instructions are given, there is no violation of the confrontation clause, see **Bruton v. United States**, 391 U.S. 123 (1968), and there is no requirement to sever based on the multiple statements of co-defendants.

Defendant next argues that he may desire to call other codefendants as witnesses in his behalf but he will be prevented from doing so if they are tried together. In order to support his request for severance on such grounds, Defendant must show that (1) he would call a codefendant as a witness at a separate trial; (2) the codefendant would testify at this trial; and (3) this testimony would be exculpatory. See **United States v. Voss**, 787 F.2d 393, 401 (8th Cir. 1986). See also **Darden**, 70 F.3d at 1527 (finding no abuse of discretion in denial of severance requested on grounds that movant was deprived of codefendant's testimony, and noting that to be entitled to severance on such grounds the movant must show that the unavailable testimony would be substantially exculpatory).

"To obtain severance on the ground that a codefendant will testify favorably, a defendant must show that the codefendant is likely to testify at a

separate trial and that the testimony would *substantially* exculpate him." **United States v. Lucht**, 18 F.3d 541, 553 (8th Cir. 1994) (citing United States v. DeLuna, 763 F.2d 897, 920 (8th Cir. 1985)) (emphasis added). For testimony to be "substantially exculpatory," it must "'do more than merely tend to contradict a few details of the government's case.'" **United States v. Oakie**, 12 F.3d 1436, 1441 (8th Cir. 1993) (quoting DeLuna, 763 F.2d at 920). Severance is not required "simply because a codefendant might testify and therefore only 'increase the chances of acquittal or tend to rebut some aspect of the government's case.'" **United States v. Foote**, 920 F.2d 1395, 1400 (8th Cir. 1990) (quoting United States v. Reed, 733 F.2d 492, 508 (8th Cir. 1984)). "Exculpation is required." **Id.** The court must determine "whether joinder results in 'real prejudice' to the party requesting severance." **Id.** (citations omitted with the exception of United States v. Machado, 804 F.2d 1537, 1544 (11th Cir. 1986) (holding that "[a] defendant who moves for severance in order to enable him to obtain favorable testimony from a codefendant must show: (1) a bona fide need for the testimony; (2) the substance of the desired testimony; (3) the exculpatory nature and effect of the desired testimony; and (4) that the codefendant would indeed have testified at a separate trial. Once the defendant makes that threshold showing, the trial court must then: (1) examine the significance of the testimony in relation to the defendant's theory of the case; (2) assess the extent of prejudice caused by the absence of the testimony; (3) consider judicial administration and economy; and (4) give weight to the timeliness of the motion.") (internal citations omitted)).

Defendant's conclusory statement that a codefendant's statement will provide exculpatory testimony or evidence is insufficient to meet his burden.

Defendant's motion should therefore be denied without prejudice to his reasserting it at trial if the Government intends to offer unredacted statements of a codefendant which names or identifies Defendant.

D. Defendant's Motion to Suppress Evidence and Statements. [Doc. 74]

There are no allegations or evidence that Defendant made any statement to law enforcement officers. His motion to suppress statements therefore should be denied as moot.

With respect to the seizure of evidence, the parties agree that a vehicle in which Defendant was a passenger was stopped by law enforcement officers on October 21, 2007. The car was searched and a bag containing $62,496.00 was seized. Counsel for Defendant proferred that Defendant has no ownership rights or possessory interests in the cash seized. Indeed, Defendant claims that he was not aware of the contents of the plastic bag seized by the police.

"Fourth Amendment standing is given only to those who can claim a 'legitimate expectation of privacy' in the object that is searched.'" **United States v. Gutberlet**, 939 F.2d 643, 646 (8th Cir. 1991) (quoting Rawlings v. Kentucky, 448 U.S. 98, 104 (1979)) (finding that defendant lacked such expectation in cans taken from his companion and, therefore, lacked standing to contest seizure of drugs found inside cans).

See also **United States v. Baucom**, 611 F.2d 253, 254-55 (8th Cir. 1979) (per curiam) (defendant lacked standing to object to search of person who was walking in parking lot with him when arrested and searched, regardless whether search of that person was unlawful); **Word v. United States**, 604 F.2d 1127, 1129 (8th Cir. 1979) (defendant had no standing to object to admission of medical records of his alibi witness on grounds that the acquisition of those records by the United States Attorney violated witness's constitutional rights); **United States v. John Bernard Ind., Inc.**, 589 F.2d 1353, 1361-62 (8th Cir. 1979) (certain defendants lacked the requisite legitimate expectation of privacy in business records held in an office; records were accessible to other employees and were retrieved by a cooperating government witness and co-employee of defendants.)

For the foregoing reasons, Defendant's motion to suppress evidence should be denied.

E. Defendant's Motion for Bill of Particulars or, in the Alternative, Motion to Dismiss. [Doc. 75]

Count I of the pending indictment alleges that Defendant and three codefendants conspired with each other and with an other named individual to distribute and possess heroin with the intent to distribute during the period from 2001 until the date of the indictment, in violation 21 U.S.C. §§ 841, 846. Count II repeats the allegations in Count I, and alleges that certain property of Defendant and other defendants derived from activities described in Count I of the indictment is subject to forfeiture pursuant to 21 U.S.C. § 853.

The indictment then details four separate properties consisting of money to be forfeited.

Defendant was in a car on October 21, 2007, when the police seized $62,496 from that vehicle. Defendant alleges that there are no allegations of any overt acts that Defendant is to have committed in the furtherance of this alleged conspiracy, and he is entitled to be informed of any alleged overt acts.

Defendant moves the Court for an order directing the Government to file a bill of particulars on each count.

The primary purpose of a bill of particulars is to apprise the defendant of the nature of the charges against him and to prevent or minimize the element of surprise at trial. **United States v. Wessels**, 12 F.3d 746, 750 (8th Cir. 1993). The purpose is not discovery or the provision of a "detailed disclosure of the government's evidence at trial." **Id.**; accord **United States v. Matlock**, 675 F.2d 981, 986 (8th Cir. 1982); **UnitedStates v. Hill**, 589 F.2d 1344, 1352 (8th Cir. 1979).

The indictment in this case is sufficiently precise to inform Defendant of the charge against him in order to enable him to prepare a defense, to avoid the danger of surprise at trial, and to plead his acquittal or conviction as a bar to further prosecution on the same offense. See **Wong Tai v. United States**, 273 U.S. 77, 80-81 (1927).

"As a general rule, an indictment is sufficient if it 'first, contains the essential elements of the charged offense and fairly informs a defendant of the charges

against which he must defend, and second, enables him to plead double jeopardy as a bar to a future prosecution.'" **United States v. Just**, 74 F.3d 902, 903 (8th Cir. 1996) (quoting Hamling v. United States, 418 U.S. 87, 117 (1974)); accord **United States v. Pemberton**, 121 F.3d 1157, 1169 (8th Cir. 1997). The indictment in the instant case is a plain, concise, and definite statement of the essential facts constituting the offense charged and complies in all respects with Rule 7(c) of the Federal Rules of Criminal Procedure. Moreover, the indictment closely tracks the language of the underlying statutes and, therefore, is legally sufficient. See **United States v. Oakie**, 12 F.3d 1436, 1440 (8th Cir. 1993). See also **United States v. Pennington**, 168 F.3d 1060, 1064 (8th Cir. 1999) (rejecting as meritless sufficiency challenge to indictment that, although it alleged offense recognized by law, did not cite statute and did not use exact words in statute; language in indictment was sufficient to apprise defendant of charges and to allow him to prepare effectively for trial).

"[A] pretrial motion to dismiss an indictment is not a permissible vehicle for addressing the sufficiency of the government's evidence." **United States v. DeLaurentis**, 230 F.3d 659, 660 (3rd Cir. 2000) (holding that Fed. R. Crim. P. 12(b)(2) authorizes dismissal of an indictment on the grounds that its allegations are not sufficient to charge an offense but not on the grounds that the evidence is not sufficient to prove the charges).

> "In civil cases, of course, the summary judgment procedures contemplated by Federal Rule of Civil Procedure 56 may be utilized to test, pretrial, the sufficiency of the evidence to

> establish triable issues of fact; but there is no corollary in criminal cases. The government is entitled to marshal and present its evidence at trial, and have its sufficiency tested by a motion for acquittal pursuant to Federal Rule of Criminal Procedure 29. . . . [W]e simply cannot approve dismissal of an indictment on the basis of predictions as to what the trial evidence will be."

United States v. Ferro, 252 F.3d 964, 968 (8th Cir. 2001) (quoting DeLaurentis, 230 F.3d at 661) (alterations in original).

Defendants also argue that the indictment fatally fails to allege an overt act in support of the conspiracy alleged in Count I of the indictment. This argument is unavailing. Count I alleges that defendants knowingly conspired to distribute and possess heroin in violation of 21 U.S.C. §§ 841, 846. A conspiracy requires the Government to prove "'that there was an agreement to achieve some illegal purpose, that the defendant knew of the agreement, and that the defendant knowingly became part of the conspiracy.'" **United States v. Cabrera**, 116 F.3d 1243, 1244 (8th Cir. 1997) (quoting United States v. Ivey, 915 F.2d 380, 383-84 (8th Cir. 1990)). Thus, "[t]o be guilty of a conspiracy, a defendant need only knowingly contribute his efforts in furtherance of the conspiracy." **United States v. Sykes**, 977 F.2d 1242, 1247 (8th Cir. 1992) (citing United States v. Fanello, 662 F.2d 505, 509 (8th Cir. 1981)). Section 846 does not require proof of an overt act, nor is it essential to show actual possession of the controlled substance to prove distribution. See **Id.** See also **United States v. Abdullah**, 947 F.2d 306, 310 (8th Cir. 1991) ("It is well settled law in this circuit

that the government does not need to prove an overt act in furtherance of a conspiracy under . . . § 846."). Thus, the allegations in Count I that (1) each defendant agreed with another (2) to violate the federal narcotics law sufficiently describe a violation of § 846. See **United States v. Covos**, 872 F.2d 805, 809-10 (8th Cir. 1989).

Also, contrary to arguments of Defendant, proof of an overt act is not required to establish a violation of the drug conspiracy statute, 21 U.S.C. § 846. **United States v. Shabani**, 513 U.S. 10, 13 (1994) (holding that the language of 21 U.S.C. § 846 does not require that an overt act "be committed to further the conspiracy, and we have not inferred such a requirement from congressional silence in other conspiracy statutes").

Accordingly, Defendant's motion for bill of particulars or, in the alternative, motion to dismiss should be denied.

/s/ Thomas C. Mummert, III
THOMAS C. MUMMERT, III
UNITED STATES MAGISTRATE JUDGE

Dated this 30th day of January, 2009.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:08CR0566 CDP/TCM

[Filed January 30, 2009]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
AARON WILLIAMS,	)
	)
Defendant.	)
	)

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

In accordance with the Memorandum filed herein,

IT IS HEREBY RECOMMENDED that Defendant's Motion for Early Jenks Disclosure [Doc. 70] be **DENIED** as moot.

IT IS FURTHER RECOMMENDED that Defendant's Motion for Severance from Other Defendants [Doc.72] be **DENIED** without prejudice to its reassertion at trial.

IT IS FURTHER RECOMMENDED that Defendant's Motion to Suppress Statements [Doc.74] be **DENIED** as moot.

IT IS FINALLY RECOMMENDED that Defendant's Motion to Suppress Evidence [Doc.74] and Defendant's Motion for Bill of Particulars or in the Alternative Motion to Dismiss [Doc.75] both be **DENIED**.[1]

The parties are advised that they have eleven (11) days in which to file written objections to this Recommendation and the Memorandum incorporated herein pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained, and that failure to file timely objections may result in waiver of the right to appeal questions of fact. See **Griffini v. Mitchell**, 31 F.3d 690, 692 (8th Cir. 1994).

/s/ Thomas C. Mummert, III
THOMAS C. MUMMERT, III
UNITED STATES MAGISTRATE JUDGE

Dated this 30th day of January 2009.

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[1] As noted in the incorporated Memorandum, the undersigned declines to rule on Defendant's Motion to Bar or Limit Use of Co-Conspirators [Doc. 71] as that motion is more appropriately heard by the trial judge.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 09-3126

[Filed October 4, 2010]

United States of America	)
	)
Appellee	)
	)
v.	)
	)
Aaron Williams	)
	)
Appellant	)
	)

Appeal from U.S. District Court
for the Eastern District of Missouri - St. Louis
(4:08-cr-00566-CDP-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 04, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:08-cr-00566-CDP-TCM-1

[Filed December 23, 2008]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
AARON WILLIAMS, et al.,	)
	)
Defendants.	)
	)

DEFENDANT WILLIAMS' MOTION TO SUPPRESS EVIDENCE AND STATEMENTS

COMES NOW Aaron Williams, Defendant above-named, aggrieved by unlawful search and seizures by members of law enforcement, and moves to suppress any evidence and items seized by law enforcement personnel, and any statements made to them on or about 10/21/07 in a warrantless car search in the downtown area of St. Louis, Missouri, during which search there was seized $62,496.00, in violation of Defendant's 4th and 5th Amendment rights.

The grounds for this motion are as follows:

1. Defendant was a passenger in a vehicle on 10/21/07 and did not violate any law, or municipal ordinance, in the presence of the arresting officers, which would warrant a search of him or the vehicle without warrant.

2. The arrest of Defendant and the alleged traffic stop of Hick's car in which Defendant was a passenger was not based on probable cause to believe that a traffic violation had occurred.

3. The arresting officers did not have probable cause to believe on 10/21/07 that a felony, misdemeanor or ordinance violation had been committed and said officers were plain-clothes DEA officers without authority to arrest for Missouri or St. Louis City traffic violations.

4. That the funds seized from the "Hicks" vehicle were not facially contraband and were not subject to seizure.

5. The search and seizure was not reasonably incident in time and place to any lawful arrest of the defendant or was unreasonably long and in excess of reasonable time to issue a traffic summons. .

6. The search of the Hicks' vehicle was not reasonably necessary for the safety of the law enforcement official in that Defendant

was already in custody at the time the search was made. Said search and seizure was beyond the immediate vicinity of said arrest and outside defendant's immediate vicinity of control and was done without warrant.

7. Defendant did not consent to the searches and seizures of 10/21/07, and any consent which may be alleged was involuntary, and a result of coercion inherent in defendant's arrest and the presence and authority of the law enforcement officers.

8. That the car stop and search of 10/21/07 involved the search of a "closed container" (plastic bag) without probable cause or warrant and did not involve the seizure of obvious contraband or the seizure of a "single purpose" container, which might otherwise signal contraband.

9. Said searches and seizures were the product, result and poison fruit of other unlawful searches, seizures or wire/phone interceptions. CF: *Wong Sun v U.S.*

10. Said searches and seizures were the product, result and poison fruit of illegally obtained statements and therefore require suppression.

11. The grounds herein enumerated make said search and seizure unreasonable, and violative of the Fourth, Fifth and Sixth

Amendments of the United States Constitution.

12. Supporting authority will be provided following an evidentiary hearing.

WHEREFORE, Defendant prays that all items seized from Defendant, from a vehicle occupied by Defendant, and any statements or admissions made by him, be suppressed as being obtained in violation of the Fourth, Fifth, and Sixth Amendments of the United States Constitution, and Defendant prays for an evidentiary hearing to be had, and for such other relief as the Court may deem appropriate.

MEMO OF LAW

Defendant was a passenger in a vehicle that was subjected to an alleged "traffic stop" by agents in St. Louis, Missouri on 10/21/07. Said search was without warrant or probable cause and is presumptively unreasonable, *Mapp v Ohio*, 367 U.S. 643 (S. Ct.-1961). The *Gates* test is applied to auto searches. *Ill. V Gates*, 462 U.S. 213 (1983); *U.S. v Blackman*, 904 F 2d 1250 (8 Cir-1990). We are dealing with the right to search under the automobile exception [*U.S. v Ross*, 456 US 798 (1982)] but once a preliminary search fails to turn up *contraband, the search should have halted and a search warrant applied for, particularly with reference to the plastic bag, allegedly thrown into the Hicks' vehicle by Candia Johnson on 10/21/07.

The car was searched at the scene and was not the subject of an inventory search as in *Chambers v Maroney*, 399 US 42. CF: *US v Chadwick*, 433 US 1 (1977); *US v Beine*, _____ F3 _____ (8th Cir-2005).

This search is not clearly supported by probable cause to believe drugs were in the car or in a package in the car as in *California v Aceredo*, 500 US 565 (1991); *US v Place*, 462 US 696.

The agents should have held the vehicle, conducted an inventory search, *Ill v Lafayette*, 462 US 640 and/or applied for a warrant in the absence of probable cause to proceed further, but failed to do so.

This is facially a *Knowles* type traffic search where a simple traffic citation was insufficient to support a full search *Knowles v Iowa*, 525 US _____; 119 S. Ct 484 (1998).

Neither is this a *Chimel* type protective search for weapons 395 US 752. This search is not supported by probable cause or warrant and all items or statements seized on 11/7/06 should be suppressed.

WHEREFORE, Defendant Williams, respectfully moves this Court for an Order suppressing all items and statements seized by the Government in violation of Defendant's rights under the 4th and 5th Amendments to the United States Constitution.

Respectfully submitted,

MARTIN, MALEC & LEOPOLD P.C.

s/ James M. Martin

James M. Martin – ED #3754
1007 Olive – 5th Floor
St. Louis MO 63101
(314) 231-3323
(314) 231-6739 (facsimile)

mmllaw@swbell.net
Attorneys for Defendant Aaron Williams

[Certificate of Service omitted in printing this appendix]

* * *

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

NO. 4:08cr00566CDP

[Filed May 1, 2009]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
AARON WILLIAMS,	)
	)
Defendant.	)
	)

CRIMINAL INFORMATION

COMES NOW the United States of America, by and through its attorneys, Michael W. Reap, Acting United States Attorney for the Eastern District of Missouri, and Tiffany G. Becker, Assistant United States Attorney for said District, and charges in accordance with Title 21, United States Code, Section 851(a)(1), as follows:

1. Defendant Aaron Williams is presently indicted in the above-entitled case with violations of Title 21,

United States Code, Sections 846 and 841(a)(1), and criminal forfeiture.

2. Defendant Aaron Williams was convicted on September 19, 1990, of the felony crime of Possession of a Controlled Substance, in Case No. 90CR1615501 in the Circuit Court of Cook County, Illinois (Certified copy of conviction attached hereto as Exhibit A).

3. Because of said conviction and the quantity of heroin charged in Count I of the Indictment, the penalty range applicable to defendant Williams, if convicted, is a mandatory minimum term of twenty years' imprisonment without release and a maximum term of life imprisonment, pursuant to Title 21, United States Code, Section 841(b)(1)(A).

6. Copies of the certified conviction documents for the above-referenced conviction are attached hereto and will be provided to defendant Williams's attorney simultaneously with this filing.

WHEREFORE, said defendant, having previously been convicted of a felony violation of the controlled substance statutes of the State of Illinois, the Government requests that defendant, if convicted in this case, be sentenced pursuant to Title 21, United States Code, Section 841(b)(1)(A).

I, Tiffany G. Becker, Assistant United States Attorney for the Eastern District of Missouri, being duly sworn, do say that the foregoing information is true as I verily believe.

/s/ Tiffany G. Becker
TIFFANY G. BECKER, #77631
Assistant United States Attorney

Subscribed and sworn before me this 1 day of May, 2009.

/s/ James Woodward
Clerk, U.S. District Court

By: /s/ Elizabeth A. Kirkland
Deputy Clerk

[*Certificate of Service omitted in printing this appendix*]

* * *

APPENDIX H

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

{Fold-out exhibit, see next 6 pages.}

PEOPLE OF THE STATE OF ILLINOIS

VS NUMBER 90CR1615501

AARON WILLIAMS

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION with the Clerk of the Circuit Court.

Charging the above named defendant with:

A 56.5 1402-C F PCS ANY OTHR AMT CONTS
The following disposition(s) was/were rendered before the Honorable Judge(s):

07/11/90 IND/INFO-CLK OFFICE-PRES JUDGE FITZGERALD, THOMAS R.		07/18/90 1701
07/18/90 DEFENDANT NOT ARRAIGNED BASTONE, ROBERT P.		
07/18/90 CASE ASSIGNED BASTONE, ROBERT P.		07/26/90 1735
07/26/90 DEFENDANT ARRAIGNED LAMPKIN, BERTINA E		
07/26/90 PLEA OF NOT GUILTY LAMPKIN, BERTINA E		
07/26/90 WITNESSES ORDERED TO APPEAR LAMPKIN, BERTINA E		07/26/90 1735
07/26/90 CONTINUANCE BY AGREEMENT LAMPKIN, BERTINA E		09/19/90
09/19/90 SPECIAL ORDER TICKETS (W9009020 AND W9009021) TRSFR TO TRAFFIC COURT ROOM 101 2:30PM 10 LAMPKIN, BERTINA E		
09/19/90 CHARGE AMENDED LAMPKIN, BERTINA E	C001	
09/19/90 PG JW FINDING GUILTY LAMPKIN, BERTINA E	C001	
09/19/90 SENTENCED TO COMMUNITY SERVICE 120 HOURS COMMUNITY SERVICE LAMPKIN, BERTINA E	C001	
09/19/90 710-1410 PROBATION AND G.E.D. 1 YRS LAMPKIN, BERTINA E	C001	
01/30/91 CASH BOND REFUND D0028446	B001	

PEOPLE OF THE STATE OF ILLINOIS

VS NUMBER 90CR1615501

AARON WILLIAMS

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION
01/30/91 BOND-DEDUCT COURT AUTOMTN FEE 003
04/03/91 SPECIAL ORDER
W-9-009-020 (NS) W-9-009-021 (MS NOLLE) TRAFFIC TICKETS
LAMPKIN, BERTINA E
08/28/91 CHANGE PRIORITY STATUS M
LAMPKIN, BERTINA E
08/28/91 DEFENDANT IN CUSTODY
LAMPKIN, BERTINA E
08/28/91 BOND TO STAND
'D' BOND FOR $25,000 TO STAND
LAMPKIN, BERTINA E
08/28/91 CONTINUANCE BY ORDER OF COURT 10/18/91
LAMPKIN, BERTINA E
08/28/91 DEFENDANT ON BOND
D6065903 $25,000
08/28/91 CONTINUANCE BY ORDER OF COURT 10/18/91 1735
10/18/91 DEFENDANT IN CUSTODY
10/18/91 APPEARANCE FILED
10/18/91 CONTINUANCE BY AGREEMENT 12/18/91
10/23/91 DEFENDANT ON BOND
D6097187 $25,000
10/23/91 CONTINUANCE BY ORDER OF COURT 12/18/91 1735
11/22/91 CASE ADVANCED 12/18/91 1735
LAMPKIN, BERTINA E
11/22/91 CONTINUANCE BY ORDER OF COURT 12/18/91
MOTION TO REFUND BOND - ENTERED (ON FILE)
LAMPKIN, BERTINA E
12/18/91 DEFENDANT ON BOND
LAMPKIN, BERTINA E
12/18/91 PET VIOL OF PROBATION FILED
LAMPKIN, BERTINA E
12/18/91 CONTINUANCE BY ORDER OF COURT 03/11/92
LAMPKIN, BERTINA E
03/11/92 DEFENDANT ON BOND
03/11/92 CONTINUANCE BY AGREEMENT 04/14/92
04/14/92 CONTINUANCE BY ORDER OF COURT 05/12/92
LAMPKIN, BERTINA E

PEOPLE OF THE STATE OF ILLINOIS

VS NUMBER 90CR1615501

AARON WILLIAMS

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION
05/12/92 CONTINUANCE BY ORDER OF COURT 06/24/92
LAMPKIN, BERTINA E
06/24/92 PET VIOL OF PROBATION FILED
LAMPKIN, BERTINA E
06/24/92 PETITION FOR V.O.P. ALLOWED
LAMPKIN, BERTINA E
06/24/92 WARRANT, VIOLATION OF PROB $ 100000
LAMPKIN, BERTINA E
10/23/92 DEFENDANT IN CUSTODY
LAMPKIN, BERTINA E
10/23/92 PRISONER DATA SHEET TO ISSUE
LAMPKIN, BERTINA E
10/23/92 WARR RETURNED, EXECUTED,FILED W001
LAMPKIN, BERTINA E
10/23/92 BOND TO STAND
'D' BOND FOR $100,000 TO STAND
LAMPKIN, BERTINA E
10/23/92 REINSTATEMENT - VIOL PROBATION C001 11/23/92 1735
LAMPKIN, BERTINA E
10/24/92 DEFENDANT ON BOND
D6216887 $100,000
10/24/92 CONTINUANCE BY ORDER OF COURT 11/23/92 1735
11/07/92 CASE ADVANCED 11/23/92 1799
11/07/92 DEFENDANT IN CUSTODY
11/07/92 PET VIOL OF PROBATION FILED
11/07/92 NO BAIL
BRANCH #57
11/07/92 CONTINUANCE BY ORDER OF COURT 11/09/92 1735
11/07/92 SPECIAL ORDER
JUDGE LAMPKIN 11/09/92 VOP
MORRISSEY, GEORGE M.
11/09/92 DEFENDANT IN CUSTODY
LAMPKIN, BERTINA E
11/09/92 PRISONER DATA SHEET TO ISSUE
LAMPKIN, BERTINA E
11/09/92 MOTION FOR BAIL HEARNG S 2
LAMPKIN, BERTINA E

PEOPLE OF THE STATE OF ILLINOIS

VS NUMBER 90CR1615501

AARON WILLIAMS

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION
11/09/92 BAIL AMOUNT SET $ 150000
LAMPKIN, BERTINA E
11/09/92 O/C ONLY REL DEF ON C/D BOND $ 150000
LAMPKIN, BERTINA E
11/09/92 CONTINUANCE BY ORDER OF COURT 11/23/92
LAMPKIN, BERTINA E
11/23/92 DEFENDANT IN CUSTODY
LAMPKIN, BERTINA E
11/23/92 PRISONER DATA SHEET TO ISSUE
LAMPKIN, BERTINA E
11/23/92 CONTINUANCE BY ORDER OF COURT 12/08/92
SPECIAL TO BE PREPARED
LAMPKIN, BERTINA E
12/08/92 DEFENDANT IN CUSTODY
LAMPKIN, BERTINA E
12/08/92 PRISONER DATA SHEET TO ISSUE
LAMPKIN, BERTINA E
12/08/92 SPECIAL ORDER
D 150,000 IS SATISFIED BY D6097187, D6065903, & D 6216887
LAMPKIN, BERTINA E
12/08/92 CONTINUANCE BY ORDER OF COURT 01/07/93
DEFENDANT TO BE RELEASED ON VOP ONLY
LAMPKIN, BERTINA E
01/07/93 DEFENDANT IN CUSTODY
DOOLING, DEBORAH M.
01/07/93 PRISONER DATA SHEET TO ISSUE
DOOLING, DEBORAH M.
01/07/93 TRANSFERRED 01/13/93 1731
DOOLING, DEBORAH M.
01/13/93 DEFENDANT ON BOND
HIMEL, RONALD A.
01/13/93 WITNESSES ORDERED TO APPEAR 01/13/93 1731
HIMEL, RONALD A.
01/13/93 MOTION STATE - CONTINUANCE -MS 01/15/93
HIMEL, RONALD A.
01/15/93 DEFENDANT IN CUSTODY
HIMEL, RONALD A.

PEOPLE OF THE STATE OF ILLINOIS

VS NUMBER 90CR1615501

AARON WILLIAMS

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION

01/15/93 PRISONER DATA SHEET TO ISSUE HIMEL, RONALD A.	
01/15/93 CONTINUANCE BY AGREEMENT HIMEL, RONALD A.	01/22/93
01/22/93 DEFENDANT ON BOND HIMEL, RONALD A.	
01/22/93 WITNESSES ORDERED TO APPEAR HIMEL, RONALD A.	01/22/93 1731
01/22/93 MOTION STATE - CONTINUANCE -MS HIMEL, RONALD A.	02/25/93
02/25/93 CONTINUANCE BY ORDER OF COURT LAMPKIN, BERTINA E	03/11/93
02/25/93 DEFENDANT ON BOND HIMEL, RONALD A.	
02/25/93 MOTION STATE - CONTINUANCE -MS HIMEL, RONALD A.	03/09/93
03/09/93 DEFENDANT ON BOND HIMEL, RONALD A.	
03/09/93 CONTINUANCE BY AGREEMENT HIMEL, RONALD A.	04/19/93
04/19/93 DEFENDANT ON BOND HIMEL, RONALD A.	
04/19/93 WITNESSES ORDERED TO APPEAR HIMEL, RONALD A.	04/19/93 1731
04/19/93 CONTINUANCE BY AGREEMENT HIMEL, RONALD A.	06/07/93
06/07/93 DEFENDANT ON BOND HIMEL, RONALD A.	
06/07/93 CONTINUANCE BY AGREEMENT HIMEL, RONALD A.	06/16/93
06/16/93 DEFENDANT ON BOND HIMEL, RONALD A.	
06/16/93 WITNESSES ORDERED TO APPEAR HIMEL, RONALD A.	06/16/93 1731
06/16/93 CONTINUANCE BY AGREEMENT HIMEL, RONALD A.	07/09/93
07/09/93 DEFENDANT ON BOND HIMEL, RONALD A.	

PEOPLE OF THE STATE OF ILLINOIS

VS NUMBER 90CR1615501

AARON WILLIAMS

CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION
07/09/93 WITNESSES ORDERED TO APPEAR 07/09/93 1731
HIMEL, RONALD A.
07/09/93 CONTINUANCE BY AGREEMENT 08/13/93
HIMEL, RONALD A.
08/13/93 DEFENDANT ON BOND
HIMEL, RONALD A.
08/13/93 CONTINUANCE BY AGREEMENT 09/09/93
HIMEL, RONALD A.
09/09/93 DEFENDANT ON BOND
HIMEL, RONALD A.
09/09/93 CONTINUANCE BY AGREEMENT 09/22/93
HIMEL, RONALD A.
09/22/93 CBR REQUEST RECVD AT 26 ST.
09/22/93 CBR REQUEST RECVD AT 26 ST.
09/22/93 DEFENDANT ON BOND
HIMEL, RONALD A.
09/22/93 PLEA OF NOT GUILTY
PNG TO VOP
HIMEL, RONALD A.
09/22/93 FINDING GUILTY OF V.O.P.
HIMEL, RONALD A.
09/22/93 PROB TERM UNSATIFACTOR
HIMEL, RONALD A.
09/22/93 CASH BOND REFUND TO ATTORNEY B001
HIMEL, RONALD A.
09/23/93 CBR DESIGNATED PROVIDER MONIES
D6097187
09/23/93 CBR PROCSED FRWD ACCT DEP
09/22/93 CBR REQUEST RECVD AT 26 ST.

I hereby certify that the foregoing has been entered of record on the above captioned case.
Date 03/12/09

DOROTHY BROWN
CLERK OF THE CIRCUIT COURT OF COOK COUNTY